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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-587

WILLIAM GIBBONS, Trustee of the Property of CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, Debtor,

Petitioner,

vs.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *et al.*, and INTERSTATE COMMERCE COMMISSION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *et al.*

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QUESTIONS PRESENTED

The two questions presented for review are:

1. Whether the Court of Appeals erred in deciding that orders of the Interstate Commerce Commission ("Commission") prescribing the method of determining the liability of railroads to pay rental charges ("per diem" charges) to other railroads for use of freight cars, the manner and time of settlement of per diem interline balances, and the amount and structure of per diem charges, are applicable to Chicago, Rock Island and Pacific Railroad Company ("Rock Island"), a railroad in reorganization under Section 77 of the Bankruptcy Act; and

2. Whether the Court of Appeals erred in affirming the District Court's decision that the interline debts owed by other railroads to Rock Island as of the date Rock Island entered into reorganization proceedings were the net balances (if any) in the interline accounts favorable to Rock Island.

STATEMENT OF THE CASE

On March 17, 1975, Chicago, Rock Island and Pacific Railroad Company filed a petition for reorganization under Section 77 of the Bankruptcy Act. On March 28, the District Court, pursuant to Section 77(c)(1) of the Bankruptcy Act, appointed Mr. William Gibbons to act as Trustee for the Debtor. This appointment was approved by the Interstate Commerce Commission on April 8, 1975.

Various pre-reorganization interline balances were and are owed by Debtor to the twenty-three railroad respondents (referred to herein as "Interline Railroads"). Among these are undisputed balances in the per diem account owed by Debtor to Interline Railroads.

Per diem charges are the charges which each American railroad must pay for the use of another railroad's cars. In the early days of railroading, each railroad made its own arrangements with respect to obtaining and handling cars, including whether it would make its own cars available for the use of other railroads and the terms, conditions, and charges for any such use. With the enactment of the Interstate Commerce Act in 1887, the practice of interchanging cars rather than physically transferring the lading became obligatory.

The Interstate Commerce Act, as amended, authorizes the Commission to regulate every aspect of the interchange and rental of freight cars. The Commission has been empowered to (49 U.S.C. § 1(14)(a)):

> "establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part, including (i) the compensation to be paid for the use of any locomotive, freight car, or other vehicle, (ii) the other terms of any contract, agreement, or arrangement for the use of any locomotive or other vehicle not owned by the carrier by which it is used (and whether or not owned by another carrier, shipper, or third party), and (iii) the penalties or other sanctions for nonobservance of such rules, regulations, or practices."[1]

The Commission has exercised its regulatory authority over both the manner and timing of settling interline per diem accounts, and the amount and structure of per diem charges.

The Manner And Timing Of Per Diem Settlements Has Been Prescribed By The Commission.

At an early date, the Commission exercised broad jurisdiction over the method of determining the liability and manner and time of settlement of per diem interline payments, and ordered the railroads to comply with the rules governing car-hire settlements which it prescribed. *Rules for Car-Hire Settlements*, 160 I.C.C. 369, 165 I.C.C. 495 (1930) (hereafter referred to as the "*Per Diem Rules* case"). The *Per Diem Rules* case of 1930 was instituted on the Commission's own motion and concerned "the rules for car-hire settlements between common carriers by railroad in the United States for the use and detention of freight cars while on the lines of carriers other than their owners" (160 I.C.C. at 372). The Commission considered in detail the various per diem rules enforced under the auspices of the Association of American Railroads ("AAR"), including rules dealing with per diem charges, the

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[1] Congress defined "car service" as follows (49 U.S.C. § 1(10)):

> "The term 'car service' in this part shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this part."

methods for calculating such charges, switching reclaims, interchange and junction reports (describing transfers of cars from one railroad to another), and methods of settlement.[2]

Following its analysis of these rules and of a number of prior Commission proceedings in which per diem charges had been at issue, the Commission found certain of the per diem rules to be unreasonable, but found not unreasonable Rules 11 through 17. The Commission concluded that for the future railroads should make car-hire settlements "in accordance with the per diem rules" (160 I.C.C. at 444-45). The Commission

[2] The rules dealing with per diem settlements were summarized by the Commission as follows:

> Rule 11 (Settlement 40 days after end of calendar month; 160 I.C.C. at 396):
>
> "Rule 11 stipulates that the car owner shall be furnished with a per diem statement, within 40 days after the end of each calendar month, giving the number of days each car has been in possession of the road making the report. Upon receipt of this information it is customary for the car owner to draw on the using line for the amount reported, after deducting per diem if any, which it owes the other carrier."
>
> Rules 12-17 (160 I.C.C at 397):
>
> "Rule 12 merely states that 'the settlement of amounts accruing for the use of cars shall be made monthly without regard to reclaims pending.' Rule 13 outlines procedures and time limits, in connection with presentation of reclaim bills. Rule 14 authorizes the reclaim of per diem in instances where cars are in error delivered to the wrong railroad, or delivered without forwarding directions, etc., the erring carrier to pay the reclaim. Rule 15 relates to responsibility for per diem accruing on cars which a road refuses to receive, where no embargo has been placed. Rule 16 provides that when an embargo is laid, the issuing carrier must receive cars loaded prior to the date the embargo was issued or be responsible for the per diem accruing for each day it fails to receive such equipment. Rule 17 provides for the establishment of an arbitration committee to settle cases arising under the rules."

then ordered that the carriers "shall make car hire settlements direct with car owners in accordance with the per diem rules" (Record Doc. No. 5, attached to Affidavit of J. M. Johnson).[3]

[3] The Commission had initially decided not to make the per diem rules mandatory, but instead stated that "carriers *will be expected to modify their rules and practices to conform with our conclusions* herein. If this is not done within a reasonable period, the matter may be brought to our attention for appropriate action." (*Id.*, at 445; emphasis supplied) The carriers, however, did not voluntarily conform their rules and practices to the Commission's conclusions, but instead the AAR issued a circular to the member carriers stating that the Commission's decision did "not have the same status as an order" so that the railroads were "not legally required to comply" with that decision (165 I.C.C at 495). The Commission thereupon made its findings mandatory (165 I.C.C. at 496). Pursuant to this decision, the Commission entered its Order, dated July 15, 1930, which concluded by directing that the carriers "*shall make car hire settlements* direct with car owners *in accordance with the per diem rules*":

> "It is ordered, That respondents herein, as shown in the appendix hereto and made a part hereof, be, and they are hereby, notified and *required* to cease and desist, on or before October 1, 1930, and thereafter to abstain, from applying rules for car-hire settlements which are in conflict with *those prescribed for future application* in the next succeeding paragraphs.
>
> "It is further ordered, That the said respondents herein be, and they are hereby, notified and *required to establish*, on or before October 1, 1930, and *thereafter to maintain and observe, rules with respect to car-hire settlements* which shall provide:
>
> * * *
>
> "(4) That common-carrier railroads which interchange freight cars with more than one subscriber railroad, and which deliver to one or more subscribing carriers, freight cars which are received from another such carrier, and railroads 100 miles or more in length, regardless of the number of railroads with which they connect, *shall make car-hire settlements direct with car owners in accordance with the per diem rules.*
>
> * * *
>
> "It is further ordered, *That this order shall continue in effect until the further order of the Commission.*" (Emphasis supplied)

The Commission's order prescribing the per diem rules was sustained by the Supreme Court in *Chicago, Rock Island and Pacific Railroad Co.* v. *United States*, 284 U.S. 80 (1931). The Supreme Court there held that the Commission's power to prescribe rules with respect to "car service" included power to promulgate "rules prescribing forms and methods of accounting, reporting and distributing payments in respect of such service" (284 U.S. at 95), and ruled that the Commission's order "requires" the per diem charges to be paid in accordance with the prescribed rules (284 U.S. at 92).[4]

The Commission Has Also Prescribed The Level Of Per Diem Charges.

For more than six decades the railroads paid each other per diem amounts which were determined by the AAR. In 1953, however, the AAR sought to increase the per diem rate from $2.00 to $2.40; and several Eastern railroads refused to pay the increased amount. Thereupon, complaints were filed with the Commission seeking an order requiring all railroads to observe the AAR rates. These complaints led to the decision of the Commission in *Chicago, B. & Q. R. Co.* v. *New York, S. & W. Ry. Co.*, 297 I.C.C. 291 (1955), in which the AAR per diem rates were held to be just and reasonable and uniform per diem rates for all railroads were required. This decision was reversed on appeal in *Boston & Maine Railroad* v. *United States*, 162 F. Supp. 289 (1958), aff'd., *Boston & Maine R. Co.* v. *United States*, 358 U.S. 68 (1958), on the ground that the Commission had failed to consider certain matters, and the case was remanded to the Commission for further proceedings.

Following the remand, the Commission initiated a new proceeding under Section 1(14)(a) of the Act for the purpose of prescribing the compensation to be paid by all railroads for rental of freight cars in the future periods. During the pendency of this proceeding, Congress in 1966 enacted an

[4] The Commission's per diem settlements order remains in full force and effect today.

amendment to Section 1(14)(a) requiring the Commission, in prescribing per diem charges, to give consideration to factors affecting the adequacy of the national car supply. In response to this amendment, the Commission initiated a new, separate proceeding dealing with "incentive" per diem to determine whether incentive charges would have a favorable impact on car supply.

These two proceedings—dealing with "basic" per diem and "incentive" charges—culminated in Commission findings and orders prescribing in detail both the basic charges (on a combined time and mileage basis) and also an incentive per diem charge (applicable only to certain general service unequipped box cars) thereafter to be charged and paid by all American railroads. *Chicago, B. & Q. R. Co.* v. *New York, S. & W. R. Co.*, 332 I.C.C. 176 (1968), order sustained in *Union Pacific Railroad Co.* v. *United States*, 300 F. Supp. 318 (D. Neb. 1969), *aff'd.* 396 U.S. 27 (1969); and *Incentive Per Diem Charges*, 337 I.C.C. 183, 217 (1970), order sustained in *Florida E. C. Ry. Co.* v. *United States*, 368 F. Supp. 1009 (M.D. Fla. 1973), *aff'd.* 417 U.S. 901 (1974), and 343 I.C.C. 49 (1973), 349 I.C.C. 303 (1975).

These car hire rates prescribed by the Commission were the per diem rates in effect immediately prior to the date on which the petition for reorganization was filed herein, and are the rates in effect today.

Proceedings Below With Respect To Per Diem.

The District Court recognized that it did not have power to authorize the Debtor railroad to disregard Commission orders and rules (A. 3). However, it construed the Commission's orders and rules as limited to "creation of debts"—and not as prescribing the manner and time of settlement (A. 4). It, therefore, declined to direct Rock Island to pay the pre-reorganization per diem amounts it owed to the other Interline Railroads.

The Interstate Commerce Commission and the Interline Railroads appealed from the District Court's decision to the Court of Appeals for the Seventh Circuit. The Commission advised the Court of Appeals that in its view the car-hire rules are binding on all railroads, including railroads in reorganization, and that "since per diem is in reality the cost of joint participation in the National car system binding on all railroads bankrupt or not, not only must the level of per diem be uniformly applied, but also the mechanics of settlement—the timing of payment—must be uniformly applicable throughout the industry" (I.C.C. Brief, p. 14).

The Court of Appeals reversed the District Court's decision holding that under Section 77(c)(2) of the Bankruptcy Act, which provides that the trustee shall operate the business of the debtor "subject to . . . the jurisdiction of the Commission . . ." (11 U.S.C. § 205(c)(2)), Rock Island was required to comply with the per diem rules (A. 18-19):

"In view of the mandatory nature of Commission orders governing the settlement of per diem accounts, we conclude that the trustee must pay these accounts as they become due in accordance with the per diem rules. We do not accept the reorganization court's distinction with respect to the per diem accounts between those accounts which represent pre-reorganization car use and those which represent post-reorganization car use. Since Commission orders prescribe the *time* and *manner* of payment, the trustee is in *current* violation of Commission orders governing all operating railroads when he refuses to pay per diem accounts which become due during the reorganization period. Section 77(c)(2) requires the trustee in operation of the railroad prior to adoption of the reorganization plan to comply with all orders of the Commission. It is clear to us that this provision requires compliance with Commission orders setting mandatory rules for the settlement of per diem accounts." (Emphasis in original)

Proceedings Below With Respect To Determination Of Amounts Of Pre-Reorganization Interline Balances Owed To Rock Island.

In the railroad industry, service is frequently provided to shippers on a joint or collective basis with the railroads sharing the burdens of such expenses as car ownership, repairs, loss and damage claims, overcharges, and other costs of doing business. The sharing of these costs gives rise to the need periodically to settle accounts, with debtor railroads paying creditor railroads what is owed in each of the particular interline accounts.

Pursuant to the Accounting Rules and procedures which govern the railroad industry, interline balances are settled on a net basis at periodic intervals. The amount paid is the net balance in a particular interline account favorable to a particular carrier. For example, in the car repair account, one railroad may have more credits as against another railroad (arising out of the repairs made by the former to cars owned by the latter) than debits (arising out of the repairs made by the latter to cars owned by the former). Where a railroad has such an excess of credits over debits at the end of a month, that railroad has a favorable interline balance and is entitled under the Accounting Rules to draw on the owing railroad for the amount of the net balance.

Following commencement of the reorganization proceedings, Rock Island began submitting drafts on other railroads seeking to collect—not the net balance shown in particular interline accounts—but rather the gross amount of any credits in the accounts, without regard to the fact that under the Accounting Rules the only debt to Rock Island was the net credit balance (if any) in each account.[5]

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[5] The nature of the Rock Island's position is best indicated by the per diem account between Rock Island and Santa Fe. The account showed credit entries of $182,502 for the Santa Fe and $105,821 for the Rock Island, resulting in a favorable net balance of $76,681 for the Santa Fe. Despite the fact that the Rock Island had a debit balance in this account, it nevertheless drew on the Santa Fe in the amount of $105,821 and refused to honor the Santa Fe's draft for the net balance of $76,681.

The District Court ruled that the agreement among the railroads (including Rock Island) to settle interline balances pursuant to the Accounting Rules had created a system of "mutual open accounts" between Rock Island and each of the Interline Railroads, and that under this system debits and credits within a particular account extinguish each other as they arise leaving only the net balance (A. 8). Thus, the only debt owed by each of the Interline Railroads to Rock Island for the pre-reorganization period was the net balance (if any) in any such account favorable to Rock Island.

The Court of Appeals affirmed, holding that under the railroad Accounting Rules the only debt which Rock Island was entitled to collect from each of the Interline Railroads was the favorable net balance (if any) in each account (A. 25):

> "There is, in effect, *no* debt for the gross credits on either side. Because of this feature of the interline accounts, the reorganization court concluded, and we agree, that the trustee's attempt to present drafts for the gross credits in favor of the Rock Island on pre-reorganization interline accounts was improper."

ARGUMENT

1. Rock Island's petition seeking review of the Court of Appeals' decision requiring compliance with the Commission's per diem rules and orders makes essentially two points. Rock Island first contends that this case presents an important unresolved issue of law dealing with the respective jurisdictions of the Commission and the Bankruptcy Courts (Petition, p. 6). It then argues that the decision of the Court of Appeals is contrary to decisions of this Court (*id.*, at 10) and a decision of the Court of Appeals for the Third Circuit (*id.*, p. 12), and that these conflicts should be resolved by this Court.

There is no important unresolved issue of law in this case. The issue of whether a railroad in reorganization must continue to comply with orders of the Interstate Commerce Commission

while in reorganization was resolved long ago by Congress. The Bankruptcy Act expressly provides that a debtor in Section 77 reorganization must comply with the Commission's orders. Section 77(c)(2) of the Act states that the trustee shall operate the business of the debtor "*subject to . . . the jurisdiction of the Commission . . .*" (11 U.S.C. § 205(c)(2)) (emphasis supplied):

> "The trustee or trustees so appointed, upon filing such bond, shall have all the title and shall exercise, subject to the control of the judge and consistently with the provisions of this section, all of the powers of a trustee appointed pursuant to Section 72 or any other section of this title, and, to the extent not inconsistent with this section, if authorized by the judge, the powers of a receiver in an equity proceeding, and, *subject to* the control of the judge and the *jurisdiction of the Commission* as provided by chapter 1 of Title 40 as on August 27, 1935, or thereafter amended, *the power to operate the business of the debtor.*" (Emphasis supplied)

Section 77(c)(2) thus makes it clear that a railroad in a Section 77 reorganization must operate its business subject to outstanding Commission orders, including orders which prescribe the manner and time of payment and the amount of per diem charges.

The Interstate Commerce Act, like the Bankruptcy Act, also makes it clear that the debtor in Section 77 reorganization must comply with orders of the Commission. Section 1(17)(a) of the Act (49 U.S.C. § 1(17)(a)) deals with "*directions of the Commission as to car service*" and provides that: "It shall be the duty of *all carriers* by railroad . . . , and of their officers, agents, and employees, *to obey strictly and conform promptly to such orders or directions of the Commission* [dealing with car service]. . . ." Section 1(17)(a) then specifically provides that the duties of obedience extend to carriers in reorganization and their trustees:

> "[I]n case of failure or refusal on the part of any carrier, *receiver, or operating trustee* to comply with *any such order* or direction, such carrier, *receiver, or trustee shall be liable*

to a penalty of not less than $100 nor more than $500 for each such offense. . . ." (Emphasis supplied)

Thus, Section 1(17)(a) expressly requires that orders involving car service, including orders with respect to payment of compensation to owning lines, must be complied with by a "receiver" or an "operating trustee" or a railroad in reorganization, such as Rock Island.

Recent judicial and Commission decisions emphasize the principle that debtor railroads in reorganization must comply with outstanding Commission orders. *In re Lehigh Valley Railroad Co.*, 508 F.2d 332 (3rd Cir., 1975); *Incentive Per Diem Charges*, 349 I.C.C. 303 (1975).[6] See also *Palmer* v.

[6] The Commission in *Incentive Per Diem Charges*, 349 I.C.C. 303 (1975), recognized that the burden of maintaining the national freight car fleet is a burden borne in common by the railroad industry, and ruled that exemption from the operation of the per diem orders—even for bankrupt railroads—would be unfair to the car-owning railroads and contrary to the public interest. The Commission was asked to exempt certain railroads in reorganization and other marginal carriers from payment of incentive per diem rates. The Commission agreed with the Administrative Law Judge that the request for exemption should be denied (349 I.C.C. at 327):

> "[T]he position of the bankrupt and marginal railroads had no merit because they sought, in effect, to require the car-owning railroads to subsidize them. . . .[E]xempting these latter railroads would put added pressure on non-bankrupt debit lines, and granting bankrupt and marginal railroads an exemption might cause them to be discriminated against by non-exempt lines."

The Commission quoted with approval from the initial decision of the Administrative Law Judge, as follows (*id.*, at p. 328):

> "We now come to the bankrupt and marginal railroads who seek exclusion because of their financial difficulties. These carriers are part of the national system of railroads and their obligation to provide the nation's shippers with reasonable service on request is not different from that of other companies. . . .The circum-

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Massachusetts, 308 U.S. 79 (1946); *New Haven Inclusion Cases*, 399, U.S. 392 (1970); *Smith* v. *Hoboken*, 328 U.S. 123 (1946); *Thompson* v. *Texas Mexican Ry. Co.*, 328 U.S. 134 (1946). As this Court held in *Palmer* v. *Massachusetts*, 308 U.S. at 86-7:

> "[A]n insolvent railroad, it was realized, required the oversight of agencies specially charged with the public interest represented by the transportation system . . . [T]he whole scheme of § 77 leaves no doubt that Congress did not mean to grant to the district courts the same scope as to bankrupt roads that they may have in dealing with other bankrupt estates."

Nor is there any conflict among the Circuits to be resolved. The decision of the Court of Appeals for the Third Circuit, in *In re Penn Central Transportation Company*, 486 F.2d 519 (3rd Cir., 1973), is not inconsistent with the decision of the Seventh Circuit since the Third Circuit gave no consideration whatever to the Commission's orders prescribing the manner and time of making per diem settlements. Accordingly, the Third Circuit did not reach the question of whether a railroad in reorganization may be relieved of its obligation to comply with such orders.

In the *Penn Central* litigation, the Court of Appeals held that traditional trust principles required payment of the bal-

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> stances of the financially needy roads cannot be attributed to the car owning railroads and it would be inequitable to require the car owning railroads to subsidize carriers who are in financial distress."

Accordingly, the Commission concluded that the carriers seeking exemption had "failed to justify" any such exemption, since "the inevitable effects of granting an exemption to a group of carriers would be detrimental to the nonexempt carriers and to the total incentive per diem program." (349 I.C.C. at pp. 329-330) Petitioner conceded in the Court of Appeals that the Commission's order in the *Incentive Per Diem* case "clearly falls within the regulatory power of the Commission" (Brief, p. 11).

ances due in the freight and passenger interline accounts but declined to extend this holding to the other interline accounts, stating (486 F.2d at 528):

> "We have concluded that amounts due in these accounts [other than freight and passenger] are not held in trust. These accounts do not involve collection of money by one carrier for another. These accounts merely represent the performance of services by one railroad."

The Third Circuit did not refer to or consider the per diem rules prescribed by the Commission, nor did it address itself at all to the question of whether the railroad in réorganization (Penn Central) could be relieved of its obligations under those orders. The Court of Appeals for the Seventh Circuit, in the instant case, correctly rejected the argument that the *Penn Central* decision constituted a controlling precedent, stating (A. 20-21):

> "The result in *Penn Central* was reached by an application of trust principles. It is conceded in this case that trust principles do not require immediate payment of the pre-reorganization per diem accounts. While the existence of a trust relationship may require payment of passenger and freight accounts, as the court found in *Penn Central*, it is not conversely true that, in the absence of a trust relationship, payment of per diem accounts is *not* required. We view the question before us as essentially a question of statutory construction and have resolved it upon a consideration of the applicable provisions of Section 77 and the policies they represent. We do not believe that our reasoning or the result we have reached is in conflict with the decision of the Third Circuit."

That there is no conflict between the decision below and any decision of the Court of Appeals for the Third Circuit with respect to the issue here presented is confirmed by the recent decision of that Court in *In re Lehigh Valley Railroad Co.*, 508 F.2d 332 (3rd Cir., 1975). In that case, trustees for the Penn Central secured an order requiring payment of certain interline balances by the Lehigh Valley. On appeal, Lehigh Valley asserted that a condition of the 1968 merger between the Penn Central and the New York Central, imposed by the Commis-

sion in its order approving the merger, required the Penn Central to keep the Lehigh Valley operational. Appellants contended that the Penn Central, which was then in reorganization, was fully bound by the conditions which the Commission had imposed and that this condition precluded the trustees' demand for current payment of net interline balances. In a unanimous opinion, the Court of Appeals for the Third Circuit held that the Penn Central reorganization court was without authority to vary the conditions imposed on the railroad by order of the Commission, which remained binding on the railroad in reorganization (508 F.2d at 338):

> "*The reorganization court was without authority to vary the conditions of Penn Central's franchise. Only the appropriate regulatory agency could do so. Smith* v. *Hoboken R.R. Co.*, 328 U.S. 123 (1946); *Palmer* v. *Massachusetts*, 308 U.S. 79 (1939); *In re Central Railroad Co.*, 485 F.2d 208 (3rd Cir. 1973), cert. denied, 414 U.S. 1131 (1974). *Trustees appointed under § 77 of the Bankruptcy Act are subject to the jurisdiction of the Commission, and a modification of condition 14 would have required application to that agency* in addition to approval by the reorganization court. § 77(c)(2), 11 U.S.C. § 205(c)(2). . . ."[7] (Emphasis supplied.)

Accordingly, the Court of Appeals' decision enforcing the Commission's per diem rules and orders is fully supported by the applicable statutory authorities and judicial precedents, and is fully consistent with the decisions of this Court and the Court of Appeals for the Third Circuit.[8]

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[7] Petitioner also errs in asserting (Petition, pp. 10-11) that the decision below is in conflict with the decision of this Court in *Fosdick* v. *Schall*, 99 U.S. 235 (1878). The *Fosdick* case was not cited by Rock Island to either court below and was not mentioned in the Court of Appeals' decision. *Fosdick* involved the "six months rule" under which certain debts incurred during the six month period prior to reorganization may be paid in certain circumstances. The decision below was not based on the six months rule, but was instead based on the Commission's per diem rules and orders.

[8] Petitioner also claims that the decision below would result in the "taking of the Trustee's property and the Debtor's estate without

(Continued)

2. The decision below affirming the District Court's decision that the only interline debts owing to Rock Island are the net balances favorable to it in particular accounts is not mentioned in Petitioner's "Questions Presented" (Petition, p. 2), and is discussed only briefly in the petition (pp. 5, 12). The Court of Appeals' decision on this point was based on the essentially undisputed fact that the interline accounts of the railroads are "mutual open accounts" in which the day-to-day debits and credits within particular accounts are mutually extinguished as they arise, leaving only the net balance (A.24).[9] The decision involved no important unresolved question of federal law at all, let alone one involving any conflict with decisions of other courts. In all other railroad reorganizations, the interline accounts have been settled on a net basis (A.25, fn.).

(Continued)

due process or . . . without just compensation" in violation of the Fifth Amendment. Petitioner cites no authority for this theory of constitutional law, and it is plainly wrong.

[9] Petitioner, in the only argument portion of the petition dealing with the matter of determination of net balances owed to Petitioner, asserts that the netting process occurring in the mutual open accounts amounts to a "set-off" (Petition, p. 12). This is not correct. The mutual extinguishing of debits and credits in mutual open accounts occurs on a day-to-day basis as those debits and credits arise; thus, the only debt in any account to Rock Island on the date that railroad entered reorganization was the favorable net balance (if any) in such account. The courts below did not authorize or condone any setting-off of any such pre-reorganization debt owed to Rock Island by another railroad against any debts owed by Rock Island to such other railroads.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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